that this is not a sound interpretation of the statute. It amounts to this, that the statute compels the owner to assent to the creation of a lien, but that he may choose not to assent, and thus evade the statute by so stipulating in the original contract.

If the prevailing doctrine is sound, it would seem to follow that there could be no constitutional objection to a statute which provides in terms, that there shall be a lien in favor of sub-contractors, notwithstanding the original contract stipulate that no liens shall be filed.[13] Yet in a recent case, the Supreme Court of Illinois declared such an act unconstitutional, as depriving the owner of his property, namely, liberty of contract, without due process of law.[14] *Kelly* v. *Johnson*, 44 Chic. Leg. News 89 (Ill., Sup. Ct.).

DISCRIMINATION INVOLVED IN PREFERENTIAL RAILROAD RATES FOR SUBURBAN SERVICE. — A recent case raises the question of how far suburban railroad rates may be based upon considerations different from those applying to other traffic. As a railway company, by its other traffic, could still earn a profit of seven per cent on its total capitalization, through an advance in rates, it was held proper for the railroad commission to prohibit the advance within a ten-mile suburban zone and to restore therein previous rates so low that they barely covered the actual cost of the service. *Puget Sound Electric Ry.* v. *Railroad Commission*, 117 Pac. 739 (Wash.). That a large population had grown up, induced by and dependent upon rates unreasonably low would itself be no objection to an advance to reasonable rates.[1] But the court held the advanced rates to be unreasonable on the ground that the others were the only rates that those travelling daily to work in the city could afford to pay.[2] The public, however, should go without a particular service of which it cannot afford to pay the reasonable cost, which must always include a fair return upon the reasonable capitalization of the

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LAWS, 279, PURD. DIG., 13 ed., 2489. Glassport Lumber Co. *v.* Wolf, 213 Pa. St. 407, 62 Atl. 1074.

[13] *Contra*, Waters *v.* Wolf, 162 Pa. St. 153, 29 Atl. 646.

[14] The court relied to some extent on a decision of the Supreme Court of Michigan. The John Spry Lumber Co. *v.* Sault Savings Bank, Loan & Trust Co., 77 Mich. 199, 43 N. W. 778. But the statute considered in that case provided for a lien without any reference whatever to the original contract, and has been distinguished in a later Michigan case. Smalley *v.* Gearing, *supra*. It is well settled that the owner should not be burdened with a lien for materials and labor not contemplated by the original contract. Siebrecht *v.* Hogan, 99 Wis. 437, 75 N. W. 71; Selma Sash, Door & Blind Factory *v.* Stoddard, 116 Ala. 251, 22 So. 555.

[1] Southern Pacific Co. *v.* Interstate Commerce Commission, 219 U. S. 433, 31 Sup. Ct. 288. See 24 HARV. L. REV. 581.

[2] Puget Sound Electric Ry. *v.* Railroad Commission, *supra*, 744, 745. See Brunswick Water District *v.* Maine Water Co., 99 Me. 371, 59 Atl. 537. The court cites this case for the proposition that if rates cannot be reasonable to both company and customer they must be to the latter. But this doctrine is properly restricted to the peculiar circumstances attending the initial operation of public service through sparsely settled regions. Coal & Coke Ry. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613. See Southern Pacific Ry. Co. *v.* Bartine, 170 Fed. 725, 767.

private property in use.[3] Legislation fixing a rate which shifts the burden of earning its proportionate share of this return from a particular service to the other traffic has been held unreasonable under a state constitution.[4] This was irrespective of the federal ruling that under the fourteenth amendment this is no confiscation of property so long as the railroad may still earn a fair return upon its entire business.[5] The same amendment, it is submitted, may, however, be as effectually violated through a deprivation of liberty if a railroad is compelled to discriminate against a portion of the public.[6] That the reason of the law condemns discrimination equally, whether it be absolute, under similar conditions, or relative, through a disproportion of difference in charge to difference in conditions, is already being recognized.[7] Apparently the uncertainty and confusion remaining is chiefly over what is a sufficient dissimilarity.[8] That it must be one affecting the cost of service is the truly fundamental principle indicated in federal court decisions.[9] The Supreme Court, however, has held repeatedly that the relative prevalence of competition is a factor.[10] Nevertheless the majority of state courts seem to hold that the interest of the railroad in sharing competitive business should yield to the law against all discrimination.[11] That fate may await another economic law of private business by which, as the principal case demonstrates,[12] it might be profitable to stimulate this additional suburban traffic at any charge covering actual cost, if it could be secured on no other terms.[13] Already the duties of public service prohibit rate manipulation calculated to reward the large or exclusive shipper,[14] to build up one community at the expense of another,[15] or to favor certain industries in

[3] Metropolitan Trust Co. *v.* Houston & Texas Central Ry. Co., 90 Fed. 683. See Missouri, K. & T. Ry. Co. *v.* Love, 177 Fed. 493, 501; 20 HARV. L. REV. 521, 523.

[4] Morgan's L. & T. R. & S. S. Co. *v.* Railroad Commission, 127 La. 636, 53 So. 890. See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 1064, 1202. *Cf.* Pennsylvania R. Co. *v.* Philadelphia County, 220 Pa. St. 100, 68 Atl. 676; San Diego Land & Town Co. *v.* National City, 74 Fed. 79. But *cf.* St. Louis & S. F. Ry. Co. *v.* Gill, 156 U. S. 649, 15 Sup. Ct. 484; Atlantic Coast Line R. Co. *v.* North Carolina, 206 U. S. 1, 27 Sup. Ct. 585.

[5] Minneapolis & St. L. R. Co. *v.* Minnesota, 186 U. S. 257, 22 Sup. Ct. 900; Willcox *v.* Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192.

[6] *Cf.* Lake Shore & M. S. R. Co. *v.* Smith, 173 U. S. 684, 19 Sup. Ct. 565.

[7] See Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 100, 21 Sup. Ct. 561, 564; Postal Cable Tel. Co. *v.* Cumberland Tel. & Tel. Co., 177 Fed. 726, 729; 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 1340; 20 HARV. L. REV. 521, 522; 23 HARV. L. REV. 648. The principal case ignores the existence of any restraint upon relative discrimination under dissimilar conditions. Puget Sound Electric Ry. *v.* Railroad Commission, *supra*, 739, 748.

[8] See 20 HARV. L. REV. 521.

[9] Pennsylvania R. *v.* International Coal Mining Co., 173 Fed. 1.

[10] Louisville & N. R. Co. *v.* Behlmer, 175 U. S. 648, 20 Sup. Ct. 209; East Tennessee, etc. Ry. Co. *v.* Interstate Commerce Commission, 181 U. S. 1, 21 Sup. Ct. 516.

[11] Illinois Central R. Co. *v.* People, 121 Ill. 304, 12 N. E. 670; Louisville & N. R. Co. *v.* Commonwealth, 106 Ky. 633, 51 S. W. 164. See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 1377.

[12] Puget Sound Electric Ry. *v.* Railroad Commission, *supra*, 747.

[13] See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 1077, 1370; 23 HARV. L. REV. 648.

[14] Hays *v.* Pennsylvania Co., 12 Fed. 309; Western Union Tel. Co. *v.* Call Pub. Co., *supra*. *Contra*, Silkman *v.* Water Commissioners, 152 N. Y. 327, 46 N. E. 612.

[15] State *v.* Adams Express Co., 171 Ind. 138, 85 N. E. 337; Galveston Chamber of Commerce *v.* Railroad Commission, 137 S. W. 737 (Tex. Civ. App.). At least this

anticipation of increased business in return.[16] And, while properly allowing for differences in the cost of carrying articles of varying value,[17] the public service law is coming more and more to condemn rates graduated according to what it is worth while to the patron to pay,[18] or according to the purpose to which the identical service is to be put.[19] Consequently, if this law is to develop consistently, it would seem that neither the sociological nor the economic advantages of encouraging suburban communities[20] should justify the accommodation of their peculiar necessities by any modification of rates not in proportion to some difference in the cost of service.[21] However, although the railroad adopting such a policy may not at present be condemned by the law,[22] yet the position seems to be clear that this is a discrimination against other localities and in favor of a particular class which should not be ordered by the state.[23]

THE STATUS OF A STOCKHOLDER. — The doctrine that the assets of a corporation constitute a "trust fund" for the benefit of its creditors had its origin in a *dictum* of Judge Story,[1] and was adopted by a large majority of the American courts.[2] The doctrine was applied to two essentially different classes of cases. It led the courts to say that a corpo-

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cannot be done "to an unreasonable degree." Interstate Commerce Commission *v.* Louisville & N. R. Co., 118 Fed. 613. See Union Pacific Ry. Co. *v.* Goodridge, 149 U. S. 680, 690, 13 Sup. Ct. 970, 974.

[16] Hilton Lumber Co. *v.* Atlantic Coast Line R. Co., 136 N. C. 479, 48 S. E. 813; Crescent Coal Co. *v.* Louisville & N. R. Co., 143 Ky. 73, 135 S. W. 768. *Contra*, Hoover *v.* Pennsylvania R. Co., 156 Pa. St. 220, 27 Atl. 282.

[17] Interstate Commerce Commission *v.* Delaware, L. & W. Ry. Co., 64 Fed. 723.

[18] Tift *v.* Southern Ry. Co., 138 Fed. 753; Philadelphia & R. Ry. Co. *v.* Interstate Commerce Commission, 174 Fed. 687. See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 1224, 1388; 23 HARV. L. REV. 648. But see Interstate Commerce Commission *v.* Chicago, Great Western Ry. Co., 141 Fed. 1003, 1015.

[19] Baily *v.* Fayette Gas-Fuel Co., 193 Pa. St. 175, 44 Atl. 251; Postal Cable Tel. Co. *v.* Cumberland Tel. & Tel. Co., 177 Fed. 726; In the Matter of Restricted Rates, 20 Interst. C. Rep. 426.

[20] *Cf.* Chicago, R. I. & P. Ry. Co. *v.* Interstate Commerce Commission, 171 Fed. 680. The federal court held that the commission should not regard the relative economic or commercial advantages of different localities in fixing rates. This was reversed by the Supreme Court, on the ground, however, that the commission had not in fact attempted to do so. 218 U. S. 88, 30 Sup. Ct. 651. See Brewer *v.* Central of Georgia Ry. Co., 84 Fed. 258, 268. But *cf.* Southern Ry. Co. *v.* Atlanta Stove Works, 128 Ga. 207, 57 S. E. 429; State *v.* Minneapolis & St. L. R. Co., 80 Minn. 191, 83 N. W. 60.

[21] See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 1395, 1396; 20 HARV. L. REV. 523.

[22] See BEALE & WYMAN, RAILROAD RATE REGULATION, § 529.

[23] On this ground, the Interstate Commerce Commission held itself powerless to restrain the subsequent contraction of the zone within which commutation tickets were sold. Sprigg *v.* B. & O. R. Co., 8 Interst. C. Rep. 443. *Cf.* Galveston Chamber of Commerce *v.* Railroad Commission, 137 S. W. 737, 745, 748 (Tex. Civ. App.); Lake Shore & M. S. R. Co. *v.* Smith, *supra*.

[1] Wood *v.* Dummer, 3 Mason (U. S.) 308.

[2] "Ever since the case of Sawyer *v.* Hoag, 7 Wall. 610, it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a trust fund . . ." Handley *v.* Stutz, 139 U. S. 417, 427, 11 Sup Ct. 530, 534. See 9 HARV. L. REV. 481.